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July 17, 2019

The Honorable Mark T. Esper
Secretary of the Army
101 Army Pentagon
Washington, DC 20310-0101

The Honorable David L. Bernhardt
Secretary of the Interior
1849 C Street NW
Washington, DC 20240

Lieutenant General Todd T. Semonite
Commanding General and Chief of Engineers
United States Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Alan Fore
Vice President for Public Affairs
Kinder Morgan Texas Pipeline LLC
1001 Louisiana Street, Ste. 1000
Houston, TX 77002

Enrique DeLeon
Pipeline Engineer, Compliance
Permian Highway Pipeline, LLC
1001 Louisiana Street, Ste. 1000
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Re: 60-Day Notice of Intent to Bring a Citizen Suit under the Endangered Species Act

Dear Sirs and Madams:

On behalf of the Hays County, Texas, Travis Audubon Society, Larry and Arlene Becker, Jonna Murchison, and Gil Eckrich ("Plaintiffs") we are informing you of our intent to file a civil suit against the United States Army Corps of Engineers ("Army Corps"), the United States Fish

and Wildlife Service ("USFWS"), Permian Highway Pipeline, LLC ("Permian LLC"), and Kinder Morgan Texas Pipeline, LLC ("Kinder Morgan") for violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), the National Environmental Policy Act, 42 U.S.C. §§4321-4370h ("NEPA"), the Administrative Procedure Act 5 U.S.C. §§ 551 et. seq. ("APA"), as well as other violations of federal law. This letter is delivered to you pursuant to the 60-day notice requirement of 16 U.S.C. §1540(g)(2)(C).

Permian Highway Pipeline, LLC, is the owner of the Permian Highway Pipeline and the legal entity asserting authority to exercise the power of eminent domain to condemn private property for its pipeline right-of-way. Kinder Morgan Texas Pipeline, LLC is the operator of the Permian Highway Pipeline ("PHP").

Factual Background

The PHP is a proposed natural gas pipeline, 42" in diameter and designed to transport about 2 billion cubic feet of natural gas a day. The planned pipeline originates near Coyanosa in Pecos County—in an area known as the "Waha Hub"—and runs approximately 430 miles across over a thousand tracts of private property in 17 Texas counties to a termination point near Sheridan in Colorado County.

The pipeline's chosen route crosses some of the most sensitive environmental features in Central Texas and the Texas Hill Country, including the recharge zones of the Edwards and Edwards-Trinity Aquifers (which provide the drinking water supply for over 2 million Texas residents, including towns and cities such as Fredericksburg and Blanco) and federally listed endangered species habitat. It will transect sites home to artifacts of cultural and historical significance. Its path will bring massive volumes of pressurized, combustible natural gas near residential subdivisions every day. It seeks to cut a 125-foot wide swath across thousands of acres of private land, disturbing the peace and quiet enjoyment of their land by private landowners throughout its length.

On May 24, Alan Fore, Vice President of Public Affairs for Kinder Morgan, published an editorial piece in the *Austin American-Statesman* entitled "Why the Permian Highway Pipeline is the safest route." In his piece, Mr. Fore states that "many government bodies have to approve this project" and that Kinder Morgan is "meeting the legal requirements." He adds that Kinder Morgan must "get permits from the U.S. Army Corps of Engineers, which consults with the U.S. Fish and Wildlife Service on protecting endangered species."

In fact, the only entity which actually has the power to "approve" this project is Kinder Morgan itself under Texas state law. In addition, it is apparent that Kinder Morgan is cynically attempting to avoid the permitting requirements of federal environmental law by utilizing hundreds of Army Corps Nationwide Permit verifications for impacts to individual stream crossings ("Waters of the United States") and trying to depict federal agency-to-agency

consultation between the Army Corps and the USFWS under Section 7 of the ESA for those individual crossings as somehow "protecting endangered species."

The Army Corps has confirmed that Kinder Morgan intends to use the Nationwide Permitting verification process to obtain federal permitting for the project. This is a thinly-veiled attempt to avoid obtaining the necessary federal permits to allow them to lawfully "take" federally listed endangered species during the construction, operation, and maintenance of the PHP. In addition, in spite of all of its representations that it is "meeting the legal requirements here" and has "exceed what Texas law requires," it is obvious that Kinder Morgan is deliberately attempting to hide the true effects of the PHP on the human and natural environment by failing to obtain the necessary permits to comply with federal law in an effort to avoid conducting a full and necessary review of the project in accordance with the National Environmental Policy Act (NEPA).

The privately-made routing decision for the PHP made by Permian LLC and Kinder Morgan has included neither consultation with state, county, or municipal governmental entities, or the affected residents and property owners nor any consideration or evaluation of proposals for any mitigation of the resulting impact and potential danger. We appreciate the importance of the petroleum pipeline infrastructure to the Texas economy. However, in furtherance of its obligations to protect the health and safety of its residents, we believe that decisions about the route of a 42" high pressure natural gas pipeline should be subject to public hearings and input in advance from affected property owners, communities, and local governments. While Permian LLC and KMTP have apparently made numerous small routing adjustments, they have wholly refused to consider alternative routes that avoid the Hill Country, its precious groundwater resources, and federally-listed endangered species habitat. Implementing the Railroad Commission's approval of the exercise of condemnation authority for such a pipeline through one of the fastest growing counties in the State, without any advance public input or involvement, reflects a failure to weigh and balance the health, safety, and economic impacts on the county community and the State as a whole.

Kinder Morgan's vice president for public affairs, Alan Fore, has repeatedly stated that "Kinder Morgan is committed to a process based on Texas values of respect, kindness and fairness to our neighbors." If this is an honest statement, then Kinder Morgan should be more than willing to follow the proper process under federal law to obtain a valid permit for incidental take of federally listed species, and complete a full analysis of effects of the PHP to the human and natural environment, as well as reasonable alternatives, as is required by NEPA.

Kinder Morgan's representations that it will obtain ESA "coverage" under Section 7 of the ESA

As noted above, Permian LLC and Kinder Morgan intend to utilize hundreds of individual Army Corps Nationwide Permit 12 approvals in order to comply with Section 404 of

the Clean Water Act over the PHP's approximately 400-mile route. In addition, based on statements made by Kinder Morgan representatives, Permian LLC and Kinder Morgan have indicated that they are obtaining ESA "coverage" by engaging in Section 7 consultation with the USFWS in conjunction with its numerous NWP 12 verifications. Based on sworn public statements about the timeline for receiving federal permits, it is apparent that Kinder Morgan plans to request that the Army Corps consult with the USFWS under Section 7 of the ESA on the entire PHP route instead of the areas within the Army Corps jurisdiction and regulatory control in an effort to misuse the Section 7 consultation process as a "shortcut" Section 10 process. This is legally flawed and invalid.

In the January 2017 Issuance and Reissuance of Nationwide Permits, the Army Corps expressly stated that they "are retaining the long-standing practice articulated in the NWP regulations at 33 CFR 330.2(i), in which each separate and distant crossing of waters of the United States is authorized by NWP [12]." Kinder Morgan has represented that it plans to utilize a series of individual authorizations from the Army Corps under Nationwide Permit 12 in order to comply with Section 404 of the Clean Water Act for [hundreds of individual water crossings that will be impacted by the construction, maintenance, and operation of the PHP.

Kinder Morgan is deliberately choosing to force a 42" petroleum pipeline through on of the most ecologically unique and diverse areas of the state of Texas, as opposed to avoiding expected impacts to endangered species and the Edwards Aquifer by following a more traditional route that would avoid these impact. If Kinder Morgan is going to stubbornly insist upon this route for whatever reason, it should be required to follow the correct legal process before it obtains federal approvals under Section 404 and permitted incidental take of federally-listed endangered species.

The proper legal framework for the proper federal review and permitting of the PHP are detailed below.

NEPA's Environmental Review Requirement

We are also concerned that Kinder Morgan proposes to utilize the Army Corps' Nationwide Permitting Process and federal agency-to-agency consultation under Section 7 of the ESA in an effort to avoid fully analyzing the impacts of its project on the human and natural environmental, disclosing these impacts to the public or to elected officials, or allowing any sort of public comment on the environmental effects of their project.

NEPA requires the federal government to identify and assess in advance the likely environmental impact of its proposed actions, including its authorization or permitting of private actions.[1] NEPA's mandate, which incorporates notice and comment procedures, serves the twin purposes of ensuring that (1) agency decisions include informed and careful consideration of

[1] *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 756-57, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004).

environmental impact, and (2) agencies inform the public of that impact and enable interested persons to participate in deciding what projects agencies should approve and under what terms.[2] The statute serves those purposes by requiring federal agencies to take a "hard look" at their proposed actions' environmental consequences in advance of deciding whether and how to proceed.[3] The statute does not dictate particular decisional outcomes, but "merely prohibits uninformed — rather than unwise — agency action."[4]

At the heart of NEPA is the procedural requirement that federal agencies prepare and make publicly available, in anticipation of proposed "major Federal actions significantly affecting the quality of the human environment," an Environmental Impact Statement (EIS) that assesses the action's anticipated direct and indirect environmental effects, and that the agencies consider alternatives that might lessen any adverse environmental impact.[5] Regulations promulgated by the Council on Environmental Quality (CEQ) provide common guidance for all federal agencies in carrying out their NEPA responsibilities.[6] Some agencies, such as the Army Corps, have promulgated their own, complementary NEPA regulations in order to provide additional guidance to their personnel to carry out the directives of the statute and the CEQ regulations in agency-specific contexts.[7]

The CEQ regulations explain that NEPA's "federal actions" may encompass the federal government's own undertakings, such as promulgating a rule or building a public project, as well as government authorizations or support of non-federal activities, such as approving private construction activities "by permit or other regulatory decision."[8] The CEQ regulations clarify that the term "major" "reinforces but does not have a meaning independent of significantly,"[9] and explain that interpretation of the term "significantly" entails case-by-case consideration of the context of the action and the severity of its impact.[10]

There are two different types of federal agency approvals that should necessitate a pipeline-wide NEPA analysis of the PHP: (1) Clean Water Act verifications to be issued by the Army Corps for over 450 individual water crossings under Nationwide Permit 12 or an individual 404 permit to be processed and issued by the Army Corps covering the entire PHP project; and (2) conditional permission for Kinder Morgan to take endangered species in the course of constructing and maintaining the pipeline without incurring liability under the ESA — permission provided through an Incidental Take Statement, issued by the USFWS and

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[2] *Id.* at 768, 124 S.Ct. 2204.
[3] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350-51, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).
[4] *Id.* at 351, 109 S.Ct. 1835; *see also Pub. Citizen,* 541 U.S. at 756-57, 124 S.Ct. 2204.
[5] 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11.
[6] *Pub. Citizen,* 541 U.S. at 757, 124 S.Ct. 2204; *see* 40 C.F.R. pts. 1501-02.
[7] *See, e.g.,* 33 C.F.R. § 325 App. B (Corps regulations); *see also* 40 C.F.R. § 1500.2(a)-(b).
[8] 40 C.F.R. § 1508.18(a), (b)(4).
[9] 40 C.F.R. § 1508.18.
[10] *Id.* § 1508.27

implemented by the Army Corps in its verifications or permission provided by a Section 10(a)(1)(B) Incidental Take Permit processed and issued by the USFWS.

If Kinder Morgan desires to be protected against liability for "take" of federally listed species along the entire route of the PHP project, then a full NEPA analysis must be performed. In asking that the PHP project comply with the requirements of NEPA, we ask for no more than plaintiff Hays County does when planning and building county infrastructure.

Clean Water Act Verifications under Nationwide Permit 12

The Army Corps grants Clean Water Act permits in one of two ways: It issues individual permits that are tailored to specific projects[11], or it promulgates general permits, such as Nationwide Permit 12, and later "verifies" that specific manifestations of a generally approved type of project, such as crossings by pipelines and other utility lines, qualify thereunder.[12] General permits authorize categories of actions that will, alone and together, cause only minimal adverse environmental effects.[13] There is no dispute that the PHP qualifies as a "utility line" under Nationwide Permit 12. Nationwide Permit 12 authorizes utility line construction activities that affect no more than a half-acre of jurisdictional waters at any single crossing.[14]

After the Army Corps has promulgated a general permit, with public notice and an opportunity for a hearing, regional staff members consider requests for "verifications" of projects thereunder. For a project to qualify for verification under a general permit, an Army Corps District Engineer must conclude that it complies with the general permit's conditions, will cause no more than minimal adverse effects on the environment, and will serve the public interest.[15] Because the Army Corps cannot accurately anticipate the effects of thousands of future activities at the time it promulgates a general permit, the general permit's basic terms may later be supplemented by an Army Corps District Engineer's decision to attach additional, project-specific conditions at the verification stage.[16] If a District Engineer deems a project inappropriate for verification under a general permit, the engineer may require that the project instead proceed under an individual permit.[17]

Based on the significant impacts to the environment, as well as Kinder Morgan's desire to obtain ESA "coverage" for the entire 400 mile route of the PHP project, the Army Corps should require Kinder Morgan to apply for an individual Section 404 Clean Water Act Permit instead of a series of NWP 12 verifications.

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[11] *See* 33 U.S.C. §1344(a).
[12] *See id.* §1344(e); *see also* Reissuance of Nationwide Permits, 82 Fed.Reg. 1860 (Jan. 6, 2017).
[13] 33 U.S.C. § 1344(e).
[14] *See* 82 Fed.Reg. 1860.
[15] 33 C.F.R. §§ 330.1(e)(2), 330.6(a)(3)(i).
[16] 33 C.F.R. §§ 330.1(e)(2), 330.6(a)(3)(i).
[17] 33 C.F.R. § 330.6(a)(2), (d).

Endangered Species Act Consultation and Authorization under Section 7 of the ESA

When Congress enacted the ESA, it "intended endangered species to be afforded the highest of priorities."[18] The ESA generally prohibits the "take" of any members of endangered animal species, defining "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[19] Notwithstanding that prohibition, private parties such as Kinder Morgan may obtain authorization for incidental take of species where the take is not the project's objective and is sufficiently limited that it does not jeopardize the survival of the species.[20] A party may obtain such limited permission for the incidental take of species in either of two ways.

First, a party may apply to the USFWS for a permit under Section 10 of the ESA, and the USFWS may issue a permit directly to that party to take members of listed species "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[21] A Section 10 permit application must include a conservation plan that specifies the likely impact of the anticipated take as well as steps for minimizing and mitigating such impact (with identified funding sufficient to implement those steps), and that identifies which potentially less harmful alternatives were considered and why they are not being used.[22]

Second, and less directly, a private party may take listed species by complying with an Incidental Take Statement ("ITS") issued by the USFWS pursuant to ESA Section 7. Section 7 requires other federal agencies to consult with the USFWS whenever they have reason to believe that listed species or critical habitats may be affected by their planned actions, including authorizations of private parties' actions.[23] Accordingly to statements and representations made by Kinder Morgan and its representatives, the Army Corps as the "action agency," plans to consult with the USFWS in light of the Clean Water Act verifications that the Army Corps will be issuing.[24] The USFWS does allow private parties to participate in a Section 7 consultation when the contemplated action involves the action agency's approval of private-party conduct.[25] It is apparent that Kinder Morgan plans to actively participate in the ESA Section 7 consultation relating to the PHP.

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[18] *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 174, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978); *see generally* 16 U.S.C. § 1531.

[19] 16 U.S.C. §§ 1532(19), 1538(a)(1)(B).

[20] *See id.* §§ 1536(a)(2), 1539(a)(2)(B).

[21] *Id.* § 1539(a)(1)(B); *see, e.g., Gerber v. Norton,* 294 F.3d 173, 175 (D.C. Cir. 2002) (Service issuing Section 10 permit to a developer to take endangered fox squirrels incidental to constructing a residential housing project).

[22] 16 U.S.C. § 1539(a)(2)(A).

[23] *Id.* § 1536(a).

[24] *See id.; see generally* U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook (March 1998) (hereinafter "Section 7 Handbook"), http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

[25] S*ee* 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

In a Section 7 consultation, the USFWS prepares a Biological Opinion identifying the project and any likely impact on listed species or their habitat.[26] The USFWS cannot approve proposed actions that are likely to jeopardize the continued existence of listed species or critical habitat.[27] If an action will likely result in a limited amount of take that is incidental to the project, the USFWS provides the action agency and private party with an ITS as part of the Biological Opinion.[28] An ITS identifies reasonable and prudent measures — such as mitigation, monitoring, and reporting — necessary or appropriate to minimize the impact on species likely to be incidentally affected by the project, and terms and conditions required to implement those measures.[29]

It is up to an action agency that has consulted with the USFWS under Section 7 to determine whether and how to proceed with its proposed action (including permitting private activity) in light of an ITS issued by the USFWS.[30] However, the action agency **and** private party (**unless it has obtained a Section 10 permit**) must comply with the USFWS' ITS if they wish to be insulated from ESA liability for taking species incidental to the project.[31]

It is our understanding that the USFWS intends to consult with the Army Corps, and that Kinder Morgan intends to participate. However, before undertaking Section 7 consultation for the PHP, the Army Corps, the USFWS, and Kinder Morgan need to address the following questions: (1) whether Kinder Morgan will seek a Section 10 permit or a Section 7 ITS; (2) whether the Biological Opinion and its ITS will cover only the verification areas (areas under the Army Corps jurisdiction) or the entire PHP project; and (3) the geographic extent to which the Army Corps will responsible for incorporating the ITS in its verifications and enforcing it outside those jurisdictional areas.

Implementation of the ITS as Federal Action

The USFWS' development and issuance of a Section 7 ITS, standing alone, is not a federal action under NEPA; however, the Army Corps' implementation of an ITS is federal action.[32] An agency's advice to another agency on how that agency should proceed with its permitting actions does not amount to federal action under NEPA.[33] However, when the USFWS issues a Section 10 permit directly to a private party, it functions as an action agency for purposes of NEPA.

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[26] 16 U.S.C. § 1536(a)-(c); 50 C.F.R. §§ 402.02, 402.14(e), (g)-(h).
[27] 16 U.S.C. §§ 1536(a)(2), (b)(4).
[28] *Id.;* 50 C.F.R. § 402.14(i).
[29] 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(ii), (iv).
[30] 50 C.F.R. § 402.15(a); *see* 16 U.S.C. § 1536(b)(4).
[31] 16 U.S.C. § 1536(*o*)(2); 50 C.F.R. § 402.14(i)(5); *see, e.g., Bennett v. Spear,* 520 U.S. 154, 169-70, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).
[32] *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 45 (2015).
[33] *Id.*

The Section 7 Handbook makes it clear that "in incidental take statements, the [USFWS] determine[s] the amount or extent of incidental take "anticipated" (expected) due to the proposed action or an action modification by reasonable and prudent alternatives." [34] In addition, the Section 7 Handbook directs that "when writing incidental take statements, [USFWS staff must] use only the phrase "anticipated" rather than "allowable" or "authorized," as the [USFWS] **do[es] not allow or authorize (formally permit) incidental take under section 7**."[35]

It is apparent that Kinder Morgan has decided against applying to the USFWS for a private Section 10 permit, which would authorize incidental take of federally listed species resulting from the construction, operation, and maintenance of the PHP in areas outside of the Army Corps' CWA jurisdiction. However, if Kinder Morgan opts to only participate in the speedier and less transparent Section 7 process, it will have to settle for authorization of anticipated take limited to solely to those areas covered by the Army Corps NWP 12 verifications. The Army Corps can only give Kinder Morgan permission to take federally listed species free from the threat of ESA liability by formally incorporating an ITS developed during Section 7 consultation into its individual Clean Water Act NWP 12 verifications for the PHP; however, this permission is limited solely to the areas subject to the verifications.[36] The USFWS' issuance of an ITS is not the functional equivalent of a permit, but the Army Corps' incorporating of the ITS is.[37]

Based on its representations to the public, it appears that Kinder Morgan is under the misguided belief that it can be permitted or "covered" for incidental take of federally listed species if Army Corps consults with the USFWS under Section 7 on the entire PHP route, instead of the just areas tied to the Army Corps' jurisdiction/regulatory control, perhaps because it envisions that Section 7 consultation will somehow be tantamount to a shortcut Section 10 process. The Army Corps typically maintains that it has authority over a very small percentage of linear utility projects and that it will only initiate Section 7 ESA consultation, as appropriate, for the limited activities associated with a given project that it has sufficient control and responsibility to evaluate. Further, the USFWS typically takes the position that it is up to the applicant and the USFWS to provide authorization for any take outside of the Army Corps permit area under Section 10.

Even if the USFWS were to issue a Biological Opinion assessing the entire PHP, any ITS must provide that the Army Corps must insure that the ITS' measures become binding conditions of any permit issued to Kinder Morgan to carry out the proposed action for the exemption in ESA Section 7(*o*)(2) to apply.

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[34] Section 7 Handbook, *supra,* at x.
[35] *Id.*
[36] *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 46 (2015).
[37] *Id* at 45.

If Kinder Morgan is intent to pursue obtaining a series of NWP 12 verifications from the Army Corps, any ITS issues by the USFWS will not constitute authorization for Kinder Morgan to take endangered species beyond the verified crossings. In order to legally take a listed species resulting from the construction, maintenance, and operation of the PHP in areas outside of the Army Corps' jurisdiction, Kinder Morgan must have separate authorization under the Endangered Species Act, such as an ESA Section 10 permit or a Biological Opinion under ESA Section 7, with `incidental take' provisions with which Kinder Morgan must comply.

Violations of Section 9 of the Endangered Species Act

Section 9 of the ESA specifically prohibits the "take" of an endangered species.[38] "Take" is broadly defined to include harassing, harming, pursuing, wounding or killing a listed species.[39] "Harm" means "an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where is actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering"[40] The ESA's legislative history reflects Congress's intent that "take" be given the "the broadest possible" reading.[41] "Take" includes direct as well as indirect harm and need not be purposeful.[42] In addition, threatened harm of even one protected animal is sufficient for injunctive relief.[43]

Private enforcement of violations of Section 9 are authorized by the ESA's citizen-suit provision.[44] A private plaintiff can seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in take.[45]

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[38] 16 U.S.C. §1538(a)(1)(B) ("[I]t is unlawful for any person subject to the jurisdiction of the United States to…take any such species within the United States or the territorial sea of the United States.").
[39] 16 U.S.C. §1532(19).
[40] 50 C.F.R §17.3.
[41] *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995).
[42] *See id.* at 704; *see also National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994); *Loggerhead Turtle*, 895 F. Supp. at 1180 ("On Volusia County's beaches, misorientation, disorientation, and death of protected sea turtles are the direct byproducts of permitting vehicles with distracting headlights to drive upon the beach at night.").
[43] *Defenders of Wildlife v. Burnal*, 204 F.3d 920, 925 (9th Cir. 2000) ("Defenders had the burden of proving by a preponderance of the evidence that the proposed construction would harm a pygmy-owl by killing or injuring it, or would more likely than not harass a pygmy-owl by annoying it to such an extent as to disrupt its normal behavioral patterns."); *Loggerhead Turtle v. City Council of Volusia County, Fla.*, 895 F. Supp. 1170, 1180 (M.D. Fla. 1995) (The "future threat of even a single taking is sufficient to invoke the authority of the Act.").
[44] *See* 16 U.S.C. § 1540(g).
[45] *See National Wildlife Federation v. Burlington Northern Railroad,* 23 F.3d 1508, 1510-11 (9th Cir. 1994) ("The plaintiff must make a showing that a violation of the ESA is at least likely in the future."); *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (holding that injunction was proper when harm to protected species was "reasonably certain" to result); *Animal Welfare Inst. V. Beech Ridge Energy, LLC*, 675 F. Supp.2d 540, 560 (D.Md. 2009) ("[T]he ESA's citizen-suit provision provides for injunctive relief which by design prevents future actions that will take listed species."). *National Wildlife Federation v. Coleman*, 528 F.2d 359, 375 (5th Cir. 1976) (enjoining future construction of highway that threatened endangered crane habitat).

It is clear that if Kinder Morgan continues with its publically-stated intent to pursue individual NWP 12 verifications from the Army Corps and simply consult with the USFWS, then it will be permitted for take of federally listed species in only those individual crossing areas limited to the Army Corps' jurisdiction. As a result, Kinder Morgan will have no legal coverage for incidental take of listed endangered species resulting from the construction, operation, and maintenance of the PHP for over 95% of its route.

As more fully discussed below, take of federally listed species resulting from the PHP is certain to occur, in violation of Section 9 of the ESA.

Golden-cheeked warbler

The golden-cheeked warbler (*Setophaga chrysoparia*) ("GCWA") is a small insectivorous songbird that breeds only in central Texas where mature Ashe juniper-oak woodlands occur. Due to accelerating loss of breeding habitat, the GCWA was emergency listed as federally endangered in 1990. The principle threats to the GCWA and the reasons for its listing are habitat destruction, modification, and fragmentation from urbanization and some range-management practices. Because of the warbler's narrow habitat requirements, and its habit of returning to the same area every year, habitat destruction leads to elimination of populations.[46] Final Rule to List the Golden-Cheeked Warbler as an Endangered Species, 55 Fed. Reg. 53,153, 53,159 (Dec. 27, 1990).

GCWA habitat lies within the project boundaries and 300' buffer zones, with an estimated 548 acres of golden-cheeked warbler habitat occurring within the PHP's footprint, and an estimated 2355 acres of GCWA habitat within 300 feet of the PHP's footprint. It is expected that a minimum of 548 acres of this habitat will be cleared for the PHP; however, it does not appear that Kinder Morgan has conducted any presence-absence surveys for GCWA along the PHP route.

It is our understanding that Kinder Morgan is proposing to mitigate for incidental take of GCWA on its entire PHP route with over a thousand "credits" or acres of mitigation lands purchased in Burnet County, and that this proposal is currently under review by the USFWS Austin Ecological Field Services Office. It is important to note that there is generally no "mitigation" that results from the Section 7 consultation process. More importantly, there would be no need for Kinder Morgan to acquire such a large amount of "mitigation" for impacts to GCWA unless take was certain to occur as the result of construction, operation, and maintenance of the PHP project.

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[46] Final Rule to List the Golden-Cheeked Warbler as an Endangered Species, 55 Fed. Reg. 53,153, 53,159 (Dec. 27, 1990).

Taking of Listed Endangered Species in Violation of Section 9 of the ESA

It is certain that the magnitude and extent of habitat destruction and modification resulting from the PHP project will constitute a taking of GCWA under the definition of "harm". It is possible that a full NEPA review of the PHP project will require public disclosure of sufficient technical information to evaluate whether the project also constitutes a taking of Barton Spring salamanders, Austin blind salamanders, Houston toads, and other federally listed species under the definition of "harm."

The destruction of an estimated 548 acres of GCWA habitat and modification of an additional estimated 2355 acres through indirect impacts is significant. This significant amount of GCWA habitat destruction and modification will significantly impair GCWA feeding, sheltering, and breeding activities. This significant impairment to feeding, sheltering, and breeding activities will undoubtedly result in the actual death or injury to GCWA through elimination of feeding and sheltering habitat, significant fragmentation of high quality habitat created by a 300-foot scar on the landscape, and the loss of reproductive success due to the elimination of breeding habitat, nesting areas, and nest abandonment due to disturbance related to construction, operation, and maintenance of the PHP.

Plaintiffs' Demands

It is evident from its public statements that Kinder Morgan, together with the Army Corps and the USFWS, intends to commit procedural violations that will directly enable and contribute to substantive violations of the ESA resulting from the construction, operation, and maintenance of the PHP. The purpose of this letter is to put Kinder Morgan, the Army Corps, and the USFWS on notice of these violations and provide them with an opportunity to take corrective measures.[47] Thus, while Plaintiffs intend to pursue an action pursuant to ESA Section 11(g), Kinder Morgan, the Army Corps, and the USFWS, may avoid the litigation if they immediately take one or more of the following actions:

1) Kinder Morgan will apply to the Army Corps for an individual permit under Section 404 of the Clean Water Act covering the *entire* PHP project. In order to be legally sufficient, the Army Corps must conduct a full NEPA review for the PHP project with public notice and opportunity for public comment prior to issuing an individual permit for the entire PHP. In addition, the Army Corps will engage in formal consultation with the USFWS pursuant to Section 7 of the ESA, and the ITS contained in the Biological Opinion issued by the USFWS will be fully implemented into, and enforceable by the Army Corps under the individual 404 Permit issued for the entire PHP.

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[47] *See Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1210 (D. Idaho 1993), aff d, 42 F.3d 1399 (9th Cir. 1994).

2) Kinder Morgan will continue with its pre-construction notification to the Army Corps to verify individual crossings under NWP 12. The Army Corps will engage in formal consultation with the USFWS pursuant to Section 7 of the ESA, and the ITS contained in the Biological Opinion issued by the USFWS will be implemented into, and enforceable by the Army Corps only in the limited jurisdictional areas for the NWP 12 verifications. In addition, Kinder Morgan must apply to the USFWS for a Section 10(a)(1)(B) Incidental Take Permit for all areas outside of the Army' Corps jurisdiction. In order to be legally sufficient, the USFWS must conduct a full NEPA review for the PHP project with public notice and opportunity for public comment prior to issuing a Section 10(a)(1)(B) Incidental Take Permit for the areas outside of the Army Corps Jurisdiction, which comprises over 95% of the area of the PHP.

3) Kinder Morgan can work with the Army Corps, the USFWS, and other federal, state, and local governmental agencies, to move the PHP to an alternative route that would avoid substantial adverse impacts to federally listed species and the Edwards Aquifer.

Thank you for your attention to this matter. Should you wish to discuss this notice, please contact us.

Sincerely,

David P. Smith

DPS/dd

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